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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-121

UNITED STATES OF AMERICA,

Petitioner,

v.

BILLY GALE HENRY,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the record below established that the government violated Henry's Sixth Amendment right to counsel when, after Henry's indictment, the F.B.I. procured Henry's jail cellmate, a long-time paid informant, to cultivate Henry's friendship and confidence in order to elicit admissions to be used in Henry's pending trial, and when the informant engaged Henry in

conversations and then testified as a surprise witness at Henry's trial and testified that Henry had admitted participating in the crime.

STATEMENT OF THE CASE

INTRODUCTION

This case is here on a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit directing that Respondent Billy Gale Henry's motion to vacate sentence under 28 U.S.C. §2255 be granted and Henry released from custody unless the government elects to retry him. Henry was tried and convicted of armed bank robbery and received a twenty-five year sentence. His conviction was affirmed on direct appeal. Judge Richard B. Kellam of the United States District Court for the Eastern District of Virginia twice denied Henry's motion to vacate sentence under 28 U.S.C. §2255, without hearing. On Henry's second appeal to the Fourth Circuit, the Court of Appeals held that Henry's right to counsel had been violated under the rule established in *Massiah v. United States*, 377 U.S. 201 (1964). This Court granted certiorari to review the judgment.

I. TRIAL AND DIRECT APPEAL

On August 28, 1972, two masked gunmen in green fatigues robbed the Janaf Branch of the United Virginia Bank/Seaboard National, located directly across the

street from F.B.I. headquarters in Norfolk, Virginia (Tr. 8-10, 35-36).[1] By the time of Henry's trial, Johnny Ray Moore and John Oscar Luck had been convicted for this robbery. Even though only two men had entered the bank, the government nonetheless successfully convicted three men on the theory that each was in the bank. The only identifying eyewitness to the crime, John Peterson, a bystander who was outside the bank when the two robbers came out unmasked, identified Moore as one, could not definitely identify Luck, and testified that Henry definitely was not the third man he had observed waiting in the getaway car (A. 19-21, Tr. 48-50, 53). He described this man as white, with long blond hair, and around twenty-seven years old (Tr. 54). Henry, some twenty years older, in no way fit Peterson's description. Moreover, fingerprints taken from the bank where one of the robbers assaulted a teller were not Henry's (Tr. 66, 110). The strongest evidence the prosecution produced which linked Henry to the bank robbery was Henry's palmprint, implanted on a lease and a rent receipt to a Mr. Norris.[2] Both were found in the backseat of the getaway car, which was found abandoned about an hour and a half after the robbery (Tr. 72-74). The lease and rent receipt were to a house on Wailes Avenue in Norfolk. The F.B.I. agents and police then went to the Wailes Avenue

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[1] "Tr" refers to the trial transcript. When in the Appendix, the reference will also be to the appendix page (e.g., A ____, tr ____).

[2] The prosecutor tried to tie the name to Henry with evidence that he had rented an Atlanta, Georgia apartment under the name of Robert A. Norris and, as R. A. Norris, had bought radio scanner crystals (tr 156, 162).

address, where they arrested Moore and Luck and seized the bank money and crime paraphernalia (Tr. 80-82).

Henry was arrested for the Janaf bank robbery November 1, 1972 in the front yard of his Atlanta, Georgia residence. At a post-arrest interrogation conducted by F.B.I. Agent Nicholas V. O'Hara, Henry denied participating in the robbery or renting the house for which the lease was signed (Tr. 105-106). On November 15, 1972 a federal grand jury indicted Henry for the Janaf bank robbery in violation of 18 U.S.C. §2113(a) and (d).

Prior to trial, at a discovery hearing before District Judge Kellam, on December 27, 1972, Assistant United States Attorney Sims promised to "furnish statements of the accused, if any" (A. 10-11), as required by Rule 16 of the Federal Rules of Criminal Procedure. Neither written statements nor information that the prosecution would offer testimony of oral statements were turned over to the defense before trial.

At trial, to the complete surprise of the defense (A. 30, Tr. 137), the prosecutor produced two of Henry's former jail cellmates as witnesses against Henry: Edward B. Nicholas and Joseph D. Sadler. Nichols testified that he had had "opportunit[ies] to have some conversations with Mr. Henry while he was in the jail" (A. 28, Tr. 134). Sadler testified that Henry started talking to him about the crime (A. 33, Tr. 142).

Nichols testified that Henry said that he had been in the bank that he was accused of robbing several times to exchange money, and one time had been turned away because the bank was closed. He said that the reason Henry gave him for going in the bank was

because he wanted to see who opened the vault (A. 29, Tr. 136). Nichols further testified that Henry talked about several people going into the bank, "about showing guns, and a bank teller was hit" (A. 30, Tr. 138). Finally, Nichols said that Henry told him that the only thing to connect him to the bank was a rent receipt for a house he had rented (A. 30, Tr. 138).[3] He did not testify that he was a paid F.B.I. informant either at the time he was in jail with Henry or at trial.

Sadler's testimony against Henry was equally inculpatory. Sadler stated that, after Henry had a "feeling [for] what type of guy I was" (A. 33, Tr. 142) Henry made "reference that him and a fellow by the name of Luck or Lucky or something of that sort" and another man went into the bank while another man stood outside the door, and a woman waited in the getaway car. He testified that Henry had said he had to hit one of the bank officials, had taken some money and had worn a mask (A. 33, Tr. 142). On cross-examination, Sadler also admitted that he was a convicted felon and that he contacted the F.B.I. about his testimony (A. 33-34, Tr. 143), and, although he had not been promised any help in exchange for his testimony, he expected to be released from jail on probation (*Ibid.*)

Henry was convicted and sentenced to imprisonment for twenty-five years (Tr. 249). Henry's conviction was affirmed *per curiam* by the Fourth Circuit, 483 F.2d 1401 (4th Cir. 1973) and certiorari was denied, 421 U.S. 915 (1975). Henry did not raise his Fifth and Sixth Amendment claims concerning Nichols and Sadler

[3]On cross-examination, Nichols testified that, when Henry discussed the rent receipt, it was in the context of a conversation concerning the charges against Henry (A 31, Tr 139).

because he was unaware, at the time, that Nichols was a paid F.B.I. informant or that the government had knowingly allowed Sadler to perjure himself at trial.

II. THE FIRST §2255 MOTION AND APPEAL

Two years after trial Henry became aware of Nichols' role as an F.B.I. informant, and he moved to vacate conviction under 28 U.S.C. §2255 alleging, *inter alia*, that his Sixth Amendment right to counsel had been violated by the government's use of Nichols, in violation of the rule of *Massiah v. United States*, 377 U.S. 201 (1964).

Henry alleged that Nichols was a paid F.B.I. informer prior to the Henry case investigation, and that Nichols had called Special Agent Gerald T. Coughlin, an agent he had worked for in the past (A. 56-57). Henry claimed that Nichols received pay and rewards for his investigation in the Henry case and that he had continued to work for the F.B.I. since that time *(Ibid.)*, Henry claimed that Nichols had called him out on a visit on December 3 or 4, 1972 at the Norfolk City Jail and that, after Henry's transfer to the Portsmouth City Jail, Nichols came there at least twice to visit him. (A. 56-57) Henry further alleged that he had refused to talk to the F.B.I., but "they used 'informer Nichols' to do something the F.B.I. could not do, question the Petitioner—all without the presence of counsel" (A. 65). This, asserted Henry, was a "violation of the standards and guidelines set-out [sic] by the United States Supreme Court in the *Massiah* case" (A. 57). Henry additionally pointed out that Nichols, as a paid informer, had gathered information from him as an "arm of the law" and "under the color of law enforcement" (A. 65). Henry summarized his Sixth Amendment claim:

> Henry had aggressively dismissed the F.B.I. agents as they attempted to question him, [and] informer E.B. Nichols was used to engage Henry in conversation for the F.B.I. and their investigation. (A. 57).

In the same motion, Henry also alleged that the government made knowing use of Sadler's perjured testimony at trial, in violation of the due process clause of the Fifth Amendment, when F.B.I. Agent O'Hara knew that Sadler's testimony was not true (A. 56). After his trial, on April 13, 1973, Henry obtained the affidavit of yet another of his cellmates, Joseph Ray Conway.[4] Conway swore that he and Sadler were in the same cell as Henry, and that "we talked together quite a lot." One night Sadler told Conway that he couldn't stand going back to prison:

> "I asked him how he could keep from going, he told me he would tell the F.B.I. that Henry robbed the United Virginia Bank of Janaf Shopping Center. I said 'but Billy never admitted robbing no kind of bank' Sadler said, 'I know, he never admitted it, but I'll tell this to the F.B.I. and they'll keep me from going to prison' . . ."

Henry alleged that Sadler called the F.B.I. about December 12, 1972 and Conway was then mysteriously transferred to the State Farm, though his trial process was incomplete, and Henry also transferred to a different jail. He contended "[t]he F.B.I. did this to

[4]Conway's sworn affidavit, originally filed in the Fourth Circuit, was quoted in whole in Henry's *pro se* motion to vacate conviction (A 54).

avoid Henry becoming aware of the informers who were to testify—in the case of Sadler, Purjure [sic] himself at the Henry trial."

District Judge Kellam, without any hearing, dismissed Henry's motion on August 26, 1975, indicating that the issues were, or should have been, raised on direct appeal.

Henry appealed Judge Kellam's dismissal order *per se*, and, in a *per curiam* decision rendered without oral argument by Judges Winter, Craven, and Butzner, the United States Court of Appeals for the Fourth Circuit concluded that Henry's Fifth and Sixth Amendment claims were not meritless. No. 75-2142, decided March 29, 1977 (Pet. App. 54a-56a). Referring to Nichols' testimony, the court indicated that "[b]ecause Henry's attorney was not present during those conversations and Henry had not knowingly and intelligently waived his right to have his attorney present, questioning under such circumstances would be violative of his rights under the Sixth Amendment" (Pet. App. 55a). It considered Nichols' trial testimony that he had not asked Henry specific questions no refutation of Henry's claim that Nichols was paid to obtain evidence against Henry and held that it was "necessary to conduct an evidentiary inquiry to determine whether [Nichols] was acting as a government agent during his interviews with Henry . . ." The court also noted that Henry alleged that Sadler had perjured himself and that the government had arranged to have Conway moved from Henry's cell, prior to trial, to prevent Henry from discovering that perjured testimony might be used against him. "Proof of such allegations," said the court, "would establish that Henry's conviction was unconsti-

tutional under both *Brady v. Maryland*, 373 U.S. 83 (1963) (government suppression of exculpatory evidence), and *Miller v. Pate*, 386 U.S. 1 (1967) (knowing use of perjured testimony)" (Pet. App. 55a). The court of appeals remanded Henry's §2255 motion for an evidentiary inquiry on the Fifth and Sixth Amendment issues.[5] (Pet. App. 56a).

III. PROCEEDINGS AFTER REMAND

On remand, Judge Kellam purposely limited the "evidentiary inquiry" so as to avoid a hearing in open court. The Chief Judge wrote the Assistant United States Attorney and requested the F.B.I. agents' affidavits, in the hopes that he might be able to "dispose of this matter without the necessity of a public hearing" (A. 82). Judge Kellam neglected to send Henry a copy of this letter, to apprise him of the steps he had taken in his "evidentiary inquiry." In a closing thought, Judge Kellam noted that "[i]f, by chance the agents did request Sadler or Nichols to interview Henry, we probably will have to grant a hearing" (A. 83).

Also after the remand, Henry filed an amended §2255 motion on June 29, 1977 (A. 71-82). The amended complaint, suggested by the court of appeals' order, supplied Judge Kellam with much more detailed allegations than were made to the district court in the

[5] In relation to other claims raised by Henry, notably his claim that the government failed to comply with the pre-trial discovery agreement, the Court noted "it would be appropriate for the district court to permit Henry to develop those additional claims at the same time it examines the issues for which an evidentiary hearing is otherwise necessary" (Pet. App. 56a).

original §2255 motion.

In September, 1977 the prosecutor submitted the affidavits of F.B.I. agents Gerald T. Coughlin (Pet. App. 57a-60a) and Nicholas V. O'Hara (A. 84-85).

The Coughlin and O'Hara affidavits confirmed Henry's story concerning the traffic of informers and agents in and out of the Norfolk City Jail. While Henry was there pending trial, both Joseph D. Sadler and Edward B. Nichols were moved into Henry's cell.

In his affidavit, Coughlin swore that he participated in the Janaf bank robbery investigation and contacted Nichols on November 21, 1972. Coughlin admitted that Nichols had been providing confidential information for about a year for pay (Pet. App. 59a). He said that he told Nichols "not to initiate any conversations with Henry regarding the bank robbery charges against Henry, but if Henry initiated the conversations with Nichols, to pay attention to any information furnished by Henry" (Pet. App. 58a). On December 6, 1972, according to Coughlin, he again contacted Nichols, who, by that time, had been released from Norfolk City Jail. Nichols told Coughlin that "Billy Gale Henry had engaged him in conversation while he was in jail with Henry . . ." and that "Henry had talked to Nichols about the bank robbery charges against him" (Pet. App. 58a). The affidavit further stated that Nichols discussed with Henry plans for Nichols to act as a go-between for Henry once Nichols was released from jail. Apparently with Coughlin's tacit approval, "Nichols advised that he would comply with Henry's request and report the information to the F.B.I." (Pet. App. 59a). Finally, Coughlin's affidavit said that Nichols was paid by the F.B.I. "for expenses and services in connection with the

requests of Henry, and for the information furnished by Nichols" *(Ibid.)*.

O'Hara's affidavit confirmed that he had participated in the investigation of the bank robbery and that he was aware that agent Coughlin had obtained information from an informant (A. 84). O'Hara also indicated that on February 23, 1973 he interviewed Joseph Sadler at the Norfolk jail, and at that time Sadler furnished information to him, which Henry allegedly had volunteered to Sadler (A. 85). O'Hara stated that he did not direct Sadler to seek out Henry, or obtain information from him *(Ibid.)*. Although he denied contacting jail authorities to place cellmates with Henry and denied arranging transfers for Henry, O'Hara did not address the contention that Conway had been transferred to keep Sadler's upcoming perjury from Henry.

IV. THE SECOND §2255 MOTION AND APPEAL

Armed with two F.B.I. affidavits and one prisoner's *pro se*, inartfully pleaded, amended, and lengthy complaint, Judge Kellam concluded his "evidentiary inquiry" and filed a lengthy order, again denying Henry's §2255 motion. (Pet. App. 27a-51a). Judge Kellam never heard testimony, nor had he appointed counsel for Henry.

Relying on Agent Coughlin's affidavit, Judge Kellam decided that Henry's case did not come within the *Massiah* rule because Nichols was not employed to question Henry but merely to have attentive ears and report what he heard (Pet. App. 39a). Applying a new

gloss to the *Massiah* doctrine, Judge Kellam announced that "[t]here is no requirement an accused be furnished counsel when he wishes to shoot off his mouth" (Pet. App. 39a).

Judge Kellam rejected, Henry's allegations concerning Sadler's perjured testimony. Relying on O'Hara's affidavit, Judge Kellam decided that there was no sufficient showing that Sadler had testified falsely, and therefore Henry's "allegation that perjured testimony was knowingly used is without credible evidence to support" (Pet. App. 43a). As for Conway's affidavit in which Conway swore that Sadler said he would untruly tell the F.B.I that Henry robbed the bank in order to keep himself (Sadler) from going to prison, Judge Kellam declared: "The statement of Conway is not believable" (Pet. App. 43a).

Judge Kellam treated Henry's continuing complaints about Nichols' and Sadler's behavior as trifling: "in considering all the facts of the case and the assertions made by the complaint, even if it be conceded there was an error in the admission of the testimony of Sadler and Nichols, the error was harmless" (Pet. App. 40a). Judge Kellam then incorrectly stated that "without contradiction of any fact or circumstance, Henry was clearly identified by eyewitnesses as one of the bank robbers;" and that "he was clearly observed in the area, in the presence of Luck and Moore, the other two bank robbers"[6] (Pet. App. 40a).

[6]These factual errors were noted by Judge Butzner, in his concurring opinion on appeal: "On this score, the district judge's recollection of the evidence is inaccurate. The defendant was not identified by any witness to the robbery . . . I therefore join in . . . the conclusion that the error was not harmless" (Pet. App. 9a).

Henry appealed this second dismissal of his §2255 motion without a hearing, and the court of appeals appointed Henry counsel. Henry once again asserted that his right to counsel had been denied by the government's use of Nichols' testimony at his trial, in violation of *Massiah*. He contended that, although Judge Kellam had erred in failing to hold an evidentiary hearing on the remand, the addition of F.B.I. Agent Coughlin's affidavit to Nichols' trial testimony made the violation of his right to counsel sufficiently clear to warrant the court of appeals' reversing with a direction to vacate the conviction. That course, he argued, was preferable to a further remand, in light of the delays caused by the district court's continued mishandling of the motion to vacate. If the court of appeals found the record insufficient for outright reversal, he argued, a remand was required on both the right to counsel claim and the due process claim, because the district court, as to both claims, had failed to follow the first remand instruction and had failed to give Henry a chance to prove his claims at a hearing. After hearing argument, the court of appeals, with Judge Russell dissenting, reversed Judge Kellam's judgment and remanded with instructions that Henry's §2255 motion be granted and Henry be released unless the government elected to retry him. 590 F.2d 544 (4th Cir. 1978) (Pet. App. 1a-24a).

V. THE DECISION APPEALED FROM

The Fourth Circuit heard argument in Henry's second §2255 appeal over five years after trial. There was still

no developed record, because the district court had failed to follow the Fourth Circuit's direction to hold an "evidentiary inquiry." Instead of remanding again to Judge Kellam, the court decided the case on the trial record and the F.B.I. affidavits. Since the court decided on an outright reversal on the right to counsel issue, it did not reach the due process question, which could not have been finally resolved without a remand.[7]

Apply the rule established in *Massiah*, the court of appeals held that Henry's right to counsel was violated when the government used statements made to Nichols after Henry's indictment and in the absence of counsel or a knowing waiver (Pet. App. 7a). The court held that, even assuming Nichols obeyed his instructions not to interrogate Henry about the bank robbery, Nichols did engage in conversations with Henry. This would have been an interrogation within the meaning of *Brewer v. Williams*, 430 U.S. 387 (1977) "[i]f, by association, by general conversation, or both, Henry developed sufficient confidence in Nichols that Henry bared his incriminating secrets to an undisclosed paid informer . . ." (Pet. App. 7a). The majority found that even though other evidence had been introduced linking Henry to the robbery, "we cannot say beyond a

[7]If the Fourth Circuit's decision is not sustained by this Court, this case nonetheless should be remanded to that court for further proceedings concerning the necessity for a proper evidentiary hearing on both the right to counsel and due process issues. Deciding as it did, the court of appeals never had to decide whether Henry was right or wrong in claiming he was entitled to a full hearing and remand on the due process claim, and it never had to discuss whether, in the event outright reversal on the right to counsel claim was not sustained, there should be a full hearing on that claim.

reasonable doubt that Nichols' testimony did not influence the jury's verdict" (Ibid.).

In a concurring opinion, Judge Butzner added two decisive points. First, he pointed out that, by his own testimony, Nichols had not fully complied with the instruction not to engage [Henry] in conversation, but only to listen, because Nichols had admitted that he had "some conversations" with Henry. Under *Brewer v. Williams*, wrote Judge Butzner, the informant's conclusory statement that he did not question a defendant is not determinative. "The critical issue is whether, after judicial proceedings had been initiated against the defendant, an informant—acting as an agent of the government—elicited information from him in the absence of counsel. Proof of formal interrogation is unnecessary to invoke the protection of the Sixth Amendment. A conversation that is tantamount to interrogation is sufficient. 430 U.S. at 397-401" (Pet. App. 9a). The district court's judgment had to be reversed, because Nichols admitted talking to Henry, and Henry asserted that the conversation was a form of questioning (*Id.*).

Judge Russell dissented, arguing that the "crucial rule" promulgated by the majority that it was a constitutional violation to admit into evidence incriminating statements induced by an undisclosed paid informer-cellmate is effectively refuted by the ruling of this court in *Hoffa v. United States*, 385 U.S. 293, 302 (1966) that the constitution affords no protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it, even when that person is an undisclosed informer (Pet. App. 17a). Contrary to the majority, Judge Russell read *Brewer v. Williams*, 430 U.S. 387 (1977) to establish

interrogation "as the key issue," (Pet. App. 11a) and he found none in this case.

Moreover, Judge Russell could find no case which distinguished on the grounds of constitutional admissibility between incriminating statements testified to by secret informers and by private individuals. As to information given to an undisclosed informer or a private individual, "there is no basis for treating the two situations differently for purposes of admissibility."[8] (Pet. App. 18a).

The government petitioned for a rehearing, but rehearing was denied over the dissent of Judges Russell, Widener and Hall. No. 77-2338, filed March 30, 1979. The government then filed for a writ of certiorari in this court (July 25, 1979). This court granted certiorari on October 1, 1979. United States v. Henry, No. 79-121, 48 U.S.L.W. 3186 (October 2, 1979).

SUMMARY OF ARGUMENT

The decision of the court of appeals falls well within the rule of *Massiah v. United States*, 377 U.S. 201 (1964). The court should not follow the government's invitation to merge the rule of *Massiah* with that of *Miranda v. Arizona*, 384 U.S. 436 (1966), because the right to an attorney declared in the latter case is a procedural safeguard for the privilege against self incrimination, while the *Massiah* right to counsel, with strong historical roots, recognizes a change in the relationship of the state and the accused brought about by formal judicial proceedings. Only in the *Miranda* situation is interrogation the crucial inquiry.

[8]The courts consistently had held that there is a distinction between an informer who is deliberately sent in to obtain information and an individual who comes to the government after getting information. In the former case, where the informer is sent in, the rule in *Massiah* applies. *See United States ex rel. Baldwin v. Yeager*, 428 F.2d 182 (3d Cir. 1970).

Despite the foregoing, the court of appeals correctly read the record to establish the equivalent to interrogation by a paid government informant and, contrary to the government's suggestion, it cannot avoid responsibility for the conduct of a regular, paid informant sent by an F.B.I. agent to gather information.

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY FOUND A VIOLATION OF HENRY'S SIXTH AMENDMENT RIGHT TO COUNSEL.

A. The Rule Established in *Massiah v. United States*

Under the government's theory of this case, Henry's right to counsel could only have been violated if the government caused him to be questioned about the offense. (Brief for the United States, p. 20). Equating questioning and interrogation, the government argues that neither term can fairly be applied to the facts established below. Id. at 21. It then argues that the right to counsel is really implicated only in "trial-like confrontations," id. at 28, and that the *Massiah* holding ought not to be viewed from a Sixth Amendment right to counsel perspective, id. at 36.

On close analysis, the government's position is nothing more than a request that the court overrule *Massiah*, leaving in its place nothing more than the "prophylactic" requirement of *Miranda v. Arizona*, 384 U.S. 436 (1966), as it has been more recently interpreted. See, e.g., *Michigan v. Tucker*, 417 U.S. 433 (1974). The proposal is bad law and bad history, failing to recognize the different values served by the *Massiah* and *Miranda* decisions, the differences in their origin and the differences in the rules developed by those cases.

The predominant object of the *Miranda* decision was to protect the privilege against compulsory self incrimination, which the court had recently held applicable to the states in *Malloy v. Hogan*, 378 U.S. 1 (1964). Concluding that the privilege was threatened by the inherently coercive nature of custodial interrogation, the majority fashioned a series of rules calculated to counteract the inherent compulsion of custody. Important among those rules, which the court has later described as "procedural safeguards," see *Michigan v. Tucker*, 417 U.S. at 433, was the right to the presence of an attorney, because in many cases it was only with the advice of counsel that the arrested person could make an informed decision as to whether to answer questions. Because of counsel's role as protector of the prisoner's privilege against self incrimination, the *Miranda* right to counsel is violated only when the police interrogate the prisoner without advising him of the right to counsel or without obtaining a sufficient waiver of that right.

The *Massiah* right to counsel, however, has much deeper roots, and is based on the notion that, once formal litigation has started between the government

and a criminal defendant, the changed relationship of the parties dictates that the government must recognize its adversary's right to the presence of an attorney—unless suitably waived—whenever it seeks to obtain evidence from him. It is for that reason that the right to counsel declared in *Massiah* and the right to counsel declared in *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967) are the same, the right of a defendant to have the assistance of counsel to protect his interests whenever the government, "after the initiation of adversary judicial criminal proceedings," seeks to obtain from him evidence for use against him in the pending proceeding. See *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion). See also *Moore v. Illinois*, 434 U.S. 220 (1977). It is also for that reason that violation of the right to counsel of a defendant against whom formal adversary judicial proceedings have begun is dependent neither upon the presence of a "trial-like confrontation" nor upon interrogation, but solely upon the government's efforts to obtain evidence from him without counsel or valid waiver. As will be seen below, the court long ago explicitly rejected "interrogation" as a test for the post indictment right to counsel. See *McLeod v. Ohio*, 381 U.S. 356 (1965), reversing *State v. McLeod*, 1 Ohio St.2d 60, 203 N.E.2d 349 (1964). It has implicitly rejected any requirement of a "trial-like confrontation" in *Massiah* and *Brewer v. Williams* and in the corporeal identification cases, *Wade* and *Gilbert*. Moreover, the court has wisely done so. Counsel's role when the government seeks information is much more than "simply to tell the accused to say nothing." See Brief for the United States, p. 32. Counsel may well advise

the accused when and under what circumstances to cooperate in the government's continuing evidence gathering and may, as he could have in this case, guarantee that any admissions ascribed to the accused were actually made and are accurately recorded.

As the Fourth Circuit correctly recognized, Henry's case falls squarely within the purview of *Massiah v. United States*, and has little to do with the concerns this Court articulated in *Miranda v. Arizona*, 384 U.S. 436 (1966).

The most striking aspect of Henry's case is the substantial similarity between Henry's case and Massiah's. Massiah was indicted on narcotics charges, retained a lawyer and was released. While out on bail Massiah's co-defendant Colson conversed with Massiah concerning their pending case, but Massiah was unaware that Colson had agreed to cooperate with government agents. Massiah talked freely to his friend and made several damaging admissions which were recorded by a government agent and used at trial. 377 U.S. at 202-203.

This Court held that Massiah's Sixth Amendment right to counsel had been violated where the government succeeded "by surreptitious means in listening to incriminating statements" made by an indicted defendant in the absence of his retained counsel. 377 U.S. 201.

The Court indicated that the decisive fact was Massiah's indictment, which clearly entitled Massiah to the assistance of counsel while awaiting trial. 377 U.S. at 204. Mr. Justice Stewart, drawing from his own concurring opinion in *Spano v. New York*, 360 U.S. 315 (1959), explained the theory underlying the

Massiah rule:

> "under our system of justice the most elemental concepts of due process of law contemplate that an indictment be followed by a trial, 'in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law' 360 U.S. at 327." 377 U.S. at 204.

One's right to counsel under *Massiah*, therefore, has nothing to do with the interrogation process or the protection against self-incrimination. Rather, *Massiah* is concerned that, once the formal litigation process has begun, "rudimentary constitutional principles require that [an accused] be afforded the full and effective assistance of counsel." *Milton v. Wainwright*, 407 U.S. 371, 382 (1972) (Stewart, J., dissenting). Therefore, "the clear rule of *Massiah* . . . is that once adversary proceedings have commenced against an individual, he has a right to legal representation whether or not the government 'interrogates' him." Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is Interrogation? When Does It Matter*?, 67 Geo. L.J. 1, 33 (1978). Quite simply, *Massiah* did not turn on the question of whether there was an interrogation, whether Massiah was in custody, or whether *Massiah* was aware he was dealing with a government agent. It did turn on the fundamental right to the assistance of counsel when an accused has become caught up in the adversary system.

Shortly after *Massiah*, this Court reaffirmed that *Massiah* applies to exclude all incriminating statements obtained by government agents in the absence of counsel, rather than only to statements induced by government agents. *See McLeod v. Ohio*, 381 U.S. 356

(1965), *rvs'g State v. McLeod*, 1 Ohio St.2d 60, 203 N.E.2d 349 (1964) and *Beatty v. United States*, 389 U.S. 45 (1967), *rvs'g* 377 F.2d 181 (5th Cir. 1967).[9] In *McLeod* the defendant made incriminating statements "in the known presence of public officers" one week after he was indicted. 1 Ohio St.2d at 61, 203 N.E.2d at 351. The Supreme Court of Ohio affirmed the admission into evidence of the defendant's statements because of the absence of interrogation, but this Court reversed *per curiam*, on the authority of *Massiah*.

In *Beatty*, the defendant, who owned a gun shop, arranged a meeting with his friend, Sirles, who he did not know was working under the direction of Alcohol and Tax Division agents. The ATU agents wired Sirles with a shortwave radio, which transmitted Sirles' con-

[9]The government denigrates the court of appeals' reliance on *Beatty* and *McLeod*, claiming that summary dispositions carry less weight than cases fully argued on the merits. Brief for the United States, p. 26, n.12. The cases cited, however, do not prove the point. The holding of *Edelman v. Jordan*, 415 U.S. 651, 671 n.14 (1974) on the point was simply that stare decisis was outweighed by the importance of the question before the court, and, in *Parker v. Randolph*, 99 S. Ct. 2132, 2140, n.8 (1979), the criticism by Mr. Justice Rehnquist's opinion for the plurality of Mr. Justice Stevens' dissent for reliance on *Hopper v. Lousiana*, 392 U.S. 658 (1968), was based on the fact that, having merely vacated and remanded for reconsideration, the court never passed on the merits. Any criticism of that dissent for reliance on *Roberts v. Russell*, 392 U.S. 293 (1968), because of its character as a summary reversal is belied by its general acceptance as a precedent. Indeed, the fact that summary reversal is reserved for the clearest violations of prior decisions of the court suggests that the court considered *Beatty* and *McLeod* so clearly within *Massiah* that briefing and argument and an opinion on point were unnecessary.

versations with Beatty. Beatty discussed with Sirles the illegal sale of a machine gun to the informer. Because the defendant had initiated the contact and Sirles did not encourage or induce Beatty to make any statements or otherwise surreptitiously interrogate him, the Fifth Circuit held that the admission of conversations with the informer did not deprive the defendant of his Sixth Amendment rights. 377 F.2d 181, 188-189. Again this Court, in a *per curiam* decision, reversed the decision of the Fifth Circuit, on the authority of *Massiah*. 389 U.S. 45 (1967).

The facts in Henry's case are constitutionally indistinguishable from those in *Massiah*. Like Massiah, Henry was indicted and awaiting trial when he was befriended by Nichols, a paid, long-time informant who had previously agreed to cooperate with the F.B.I. At no time was Nichols like the prisoner who quite innocently overhears some conversations of a cellmate and then goes to the government with incriminating information. The F.B.I. deliberately contacted Nichols and asked Nichols to seek information about the robbery, and Nichols just as deliberately agreed to cooperate with his F.B.I. contacts. Like Massiah, Henry had no way of knowing that his jailhouse friend was working for the government against him. Indeed, in much the same way that Massiah had no idea he was being interrogated by the police but only assumed he was talking with his friend, so too did Henry converse with his cellmate Nichols. Like Massiah, then, Henry was very much the victim of an "extra-judicial, police-orchestrated proceeding" designed to elicit statements in the absence of counsel. 377 U.S. 204. Moreover, in the same way that this Court did not know exactly what Colson said to

Massiah or how he said it,[10] the record in Henry's case does not reveal what Nichols said to Henry, or how he said what he said. Henry's allegation that Nichols did indeed question him stands unrefuted by the record.

The only fact which distinguishes Henry's case is that the conversations with Nichols occurred in the Norfolk City Jail, whereas Massiah was free on bail when he conversed with Colson. The Fourth Circuit appropriately noted "because of the restrictive nature of the jailhouse setting, the instant case presents a far more compelling situation for the application of the *Massiah* rule." (Pet. App. 5a). Inmates are not usually allowed the luxury of choosing their own cellmates, which made Henry vulnerable to the busy traffic in and out of his closed quarters. It has been argued that, since a defendant's incarceration "is likely to bring into play subtle influences that will make them particularly susceptible to undercover ploys . . . these dangers would justify imposing a *Massiah*-like barrier on all undercover activity directed at an incarcerated subject." Dix, *Undercover Investigations and Police Rulemaking*, 53 Texas L. Rev. 203, 230 (1975). At the very least, the vulnerability of an indicted prisoner to undercover spies and their tricks argues against diminishing the protection which such a prisoner otherwise gets from the right

[10]This Court did not know, and "evidently the Supreme Court did not care" what Colson said to Massiah. Colson did not testify at trial. The government agent who overheard the conversation was not permitted to testify as to what Colson said, based on the best evidence rule. The record consisted only of Massiah's half of the conversation. On this point, *see* Kamisar, *Brewer v. Williams, Massiah, and Miranda: What Is Interrogation? When Does it Matter?*, 67 Geo. L.J. 1, fn. 272 (1978). In the present case, we have only Nichols' recollection of what Henry said to him.

to counsel simply because he is in jail, rather than on bail.

The facts in Henry's case amply demonstrate that his constitutional right to the effective assistance of counsel was violated, if not destroyed, by the government's actions in recruiting and encouraging Nichols to inform on Henry. Henry had been indicted and should have been afforded a trial "in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law." *Spano v. New York*, 360 U.S. at 327 (concurring opinion). Instead, Henry became the victim of an "extra-judicial, police-orchestrated proceeding," which this Court so strongly condemned in *Massiah*. In effect, Henry's cell was his courtroom, and his "trial" was presided over by Nichols and Sadler, who functioned as prosecution, judge, and jury. At this critical stage of his criminal proceeding, Henry had an absolute right to a lawyer's help.

B. Henry's Right To Counsel Was Violated If Either Nichols Induced Or Henry Volunteered His Statements.

Properly understood, *Massiah* applies to all incriminating statements obtained from the accused by government agents after indictment and in the absence of counsel or its waiver, rather than only to statements induced by government agents. (Pet. App. 5a-6a). *See McLeod v. Ohio, supra*, and *Beatty v. United States, supra*.

The rule of *Massiah* is inconsistent with the notion that, if a jail-plant acts simply as a "listening-post" and

a cellmate volunteers information, that the agent can testify concerning those statements. (Marshall, J., dissenting from dismissal of certiorari as improvidently granted in *Miller v. California*, 392 U.S. 616, 625 (1968),.

Jail plants are not placed in cells with defendants "to discuss the weather, to console [the defendant], or merely to provide [him] with companionship," but to obtain information and subvert an accused's right to counsel. *Id.* at 626. This conduct constitutes a clear violation of *Massiah* and "such deliberate police deception and subversion of a defendant's rights should not be condoned." *Id.* at 627.

It should be constitutionally irrelevant whether Henry volunteered any information, or whether Nichols induced Henry to make admissions through surreptitious means, by trickery or deception. It should also be constitutionally irrelevant if Henry initiated any conversations with Nichols. *See United States v. Anderson*, 523 F.2d 1192, 1196 n.3 (5th Cir. 1975). The thrust of *Massiah* "is to protect an indicted defendant who has counsel from the erosion of benefits of his Sixth Amendment right to counsel, done through procuring from him, in the absence of counsel, incriminating evidence that will facilitate his conviction." *Id.* at 1195.

C. The Fourth Circuit Was Correct In Concluding That Nichols Had Effectively "Interrogated" Henry Simply By Engaging Him In General Conversation.

The Fourth Circuit correctly concluded that this Court's holding in *Brewer v. Williams*, 430 U.S. 387

(1977), did not limit *Massiah* to cases in which the government has directly questioned the accused about his participation in the crime[11] (Pet. App. 6a-7a). Agreeing with the Fifth Circuit in *United States v. Anderson*, 523 F.2d 1192, 1196 (1975), the Fourth Circuit held that an undisclosed government agent may "effectively interrogate" a defendant simply by engaging the defendant in a general conversation. (*Id.*). *See also, Miller v. California*, 392 U.S. 616 (1968) (dissent from dismissal of certiorari).

In neither *Massiah* nor *Brewer* did formal interrogation of the defendants occur. Mr. Justice Stewart characterized Massiah's case as one in which the government "succeeded by surreptitious means in listening to incriminating statements." 377 U.S. at 201. There was no indication, in the record, that Colson questioned Massiah or was instructed to do so. Kamisar, 67 Geo. L.J. at 41, n.272 (1978). Similarly, this Court recognized that the detective's "Christian burial speech" to Williams was designed to elicit information "just as surely as—and perhaps more effectively than—if he had formally interrogated him." 430 U.S. at 399. Thus, the Fourth Circuit correctly concluded that neither *Massiah* nor *Brewer* require proof of a formal interrogation, but that a conversation may be tantamount to an interrogation and is sufficient to invoke the protection of the Sixth Amendment (Pet. App. 7a).

Moreover the *Brewer* court indicated that an accused

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[11] *See* Kamisar, *Brewer v. William, Massiah and Miranda: What Is Interrogation? When Does It Matter?*, 67Geo. L.J.at 42, n.283 (1978): "I think [the author of both *Massiah* and *Williams*] would be startled to learn that, although when he authored the *Williams* opinion he evidently thought he was revivifying and expanding *Massiah*, he actually was restricting its scope. . . ."

in Williams' situation could waive his right to counsel, as long as the state could prove "an intentional relinquishment of a known right or privilege. . . ." 430 U.S. at 404 (quoting from *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938),. But a defendant in Henry's situation, on the contrary, can never relinquish or abandon a known right or privilege when he converses with an undercover agent.

In his concurring opinion, Judge Butzner accurately characterized both *Massiah* and *Brewer*: "[t]he critical issue is whether, after judicial proceedings [have] been initiated against the defendant, an informant–acting as an agent of the government–elicits information from him in the absence of counsel" (Pet. App. 9a). Moreover, the record supports the conclusion of Judge Winter for the court of appeals that Nichols and Henry had "conversations" which may have caused Henry to bare secrets. (Pet. App. 7a). Judge Butzner's brief concurrence likewise pointed to these conversations. (Pet. App. 8a) Although we believe it is unnecessary to the decision, even the truncated record caused by the district court's poor handling of the case confirms that Nichols "pumped" Henry for information. Thus, Nichols testified that he had "conversations" with Henry (A 28, tr 134) the product of which was the incriminating statements which Nichols attributed to Henry (A 28, tr 134-135). According to Nichols, Henry "[told him]" about the bank robbery (A 29, tr 135), "[gave him a] reason" for going in the bank (A 29, tr 136) and "describe[d] to [him]" the bank robbery (A 29-30, tr 137). Nowhere in Nichols' testimony do we see mention of him "overhearing" Henry. As a result, the record gives no basis to characterize Nichols as a

mere listener.

Although Nichols testified that Agent Coughlin did not have him ask Henry specific questions, Nichols did not testify that he asked none (A 28, tr 135). Agent Coughlin's affidavit does not assert that Nichols had not asked questions or engaged Henry in conversation but only that he told Nichols not to question (Pet. App. 58a). Even his affidavit recounts his authorization of Nichols' efforts to further ingratiate himself to Henry after Henry's later transfer to the Portsmouth City Jail.

D. The Fourth Circuit Correctly Concluded That Nichols' Questioning Of Henry Constituted A Government Interrogation.

The Court in *Brewer* held that "the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him." 430 U.S. at 401 (1977). The Fourth Circuit concluded simply that where the government employed Nichols as a paid informer to engage Henry in conversation and elicit admissions from him, "there was interrogation within the meaning of *Brewer*" (Pet. App. 7a). The government, relying perhaps on Judge Russell's dissent, now seeks to obscure Nichols' role as a paid government jail plant, and to recast him as a "fellow prisoner [who] asked questions of respondent on his own initiative and only later decided to convey the information to the government." (Pet. 13; Brief for the United States p. 45). This new characterization has absolutely no basis in either the record or the affidavits of both

F.B.I. agents; it is quite clear that Nichols was a paid F.B.I. informer before, during, and after the Henry investigation.

The applicability of *Massiah* turns on whether a government informer is sent into prison deliberately to procure information, as opposed to an individual who is in no way connected with the government and subsequently goes to the authorities after he has quite innocently obtained information. *United States ex rel. Baldwin v. Yaeger*, 428 F.2d 182 (3rd Cir. 1970). In *Baldwin*, the Third Circuit noted that "if the police deliberately isolated the defendant with prisoners who in the past cooperated with the police, fully intending to interrogate those prisoners before trial regarding statements made to them by the defendant," then such statements would be inadmissible, under *Massiah*, as a violation of a defendant's constitutional rights: *Id.* at 184-185, n.10.

It does not matter that the government did or did not place Nichols in the same cell with Henry (Pet. App. 59a). The fact remains that F.B.I. agent Coughlin contacted Nichols on November 21, 1972 (Pet. App. 57a), and, having learned that Nichols was isolated in the same cellblock with Henry, instructed Nichols to pay close attention to anything that Henry had to say about the charges against him (Pet. App. 58a). Nichols and Coughlin had worked together before, and Nichols had been paid by Coughlin and the F.B.I. for "expenses and services" in connection with information he had provided in the past (Pet. App. 57a). It takes little imagination to conclude that Nichols had every reason to believe he would again be paid for any information he could supply concerning Henry's case. It seems equally clear that, having established contact and

discovered the fortuitous circumstance of Nichols' placement in the same cellblock as Henry, the F.B.I. fully intended to interrogate Nichols concerning his conversations with Henry, prior to Henry's trial. As such, what occurred in Henry's cell was precisely the scenario envisioned and condemned by the court in *Baldwin, supra.* Nichols hardly can be characterized now as a person "in no way connected with the government," *Id.* at 184, and therefore outside the reach of *Massiah.*

Essentially, the government would have the court see only Agent Coughlin's conduct as that for which the government is responsible. Thus, Nichols' conduct would not be chargeable to the government except to the extent that it was specifically authorized by Coughlin and especially not if it was inconsistent with instructions.

Despite citation of a hodge podge of unrelated cases (Brief for the United States, pp. 48-49) the government produces no real support for this dangerous notion. The court has had little opportunity to discuss government responsibility for the malfeasance of its paid informants. In the one instance in which the government was charged with responsibility for a paid informant who ran amuck, *Sherman v. United States*, 356 U.S. 369 (1958), the court unanimously treated his conduct as that of the government.

When the government lures criminals to act on its behalf, as it did in this case, it must be made to understand that it will be responsible for their conduct. Under the best of circumstances, informers providing information or cases for pay or to "work off" their cases are hardly to be trusted as to their methods or

the truthfulness of their information. A ruling from this court that law enforcement officers can have the benefits produced by informants but that the government bears no responsibility for their excesses will be an invitation to abuse. Conversely, application of the normal rule of agency law that a principal is responsible for the wrongdoing of one who it hires to perform a task, see, e.g., *Allen v. International Alliance*, 338 F.2d 309, 318 (5th Cir. 1964) makes the government Nichols' principal.

There is no question, on this record, that it was regular F.B.I. practice for Agent Coughlin to pay Nichols to obtain and provide information (Pet. App. 57a) and that Coughlin was authorized to do so. The length of their relationship gave Agent Coughlin ample time to measure the kind of man he was hiring. Even assuming that the *Massiah* violation in this case dependent on Nichols' disobeying, rather than following, Agent Coughlin's directions, Nichols' actions must be charged to the government. The fact that Nichols was an informant, rather than a trained agent, suggests a greater, rather than lesser, need for his target to have counsel, because he could hardly be expected to show the "due regard for all legal considerations" of a trained agent like Agent O'Hara (A 84).

CONCLUSION

The judgment below should be affirmed.[12]

Respectfully submitted,

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[12]Recognizing that the issuance of a writ of certiorari is a matter of sound discretion exercised by the Court without the benefit of the record below or briefs on the merits, it should now be apparent to this Court that the facts in Henry's case, are constitutionally indistinguishable from those in *Massiah v. United States*, 377 U.S. 201 (1964). That being so, the Court may conclude that, rather than writing an affirmance opinion, it is appropriate to dismiss the writ as improvidently granted. *Belcher v. Stengel*, 429 U.S. 118 (1976); *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180 (1958). If the Court agrees with our view of the case, the strongest reason for decision, rather than dismissal of the writ in this case would be to resolve an apparent "conflict" in the circuits, based on a contrary holding in *Wilson v. Henderson*, 584 F.2d 1185 (2d Cir. 1978). In *Wilson*, a murder suspect, after formal indictment, talked with his cellmate and admitted complicity in the murder. The cellmate (who previously agreed to act as a police informant) had been instructed "just to keep [his] ears open." With two visiting district judges forming

(continued)

(footnote continued from preceding page)

the majority, the court held that the cellmate had not "interrogated" Wilson and, therefore, Wilson's statement were not barred by the *Massiah-Williams* rule. Wilson petitioned this Court for certiorari, but the petition was untimely and denied for that reason. Had certiorari been granted, *Wilson* should have been summarily reversed on the basis of *Massiah*, as this Court has previously done in *McLeod v. Ohio*, and *Beatty v. United States, supra.*